Nos. 97-826, 97-829, 97-830 & 97-831

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP., *et al.*,
Petitioners,
v.
IOWA UTILITIES BOARD, *et al.*,
Respondents.

AND RELATED PETITIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONSOLIDATED BRIEF FOR THE UNITED STATES TELEPHONE ASSOCIATION AND THE RURAL TELEPHONE COALITION IN OPPOSITION

GARY M. EPSTEIN
MAUREEN E. MAHONEY *
RICHARD P. BRESS
JAMES H. BARKER
LATHAM & WATKINS
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004-2505
(202) 637-2200
Counsel for Respondents United States Telephone Association and Rural Telephone Coalition

* Counsel of Record

(Other counsel listed on inside cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

DAVID COSSON
L. MARIE GUILLORY
2626 Pennsylvania Ave., N.W.
Washington, D.C. 20037
(202) 298-2300
Counsel for National Telephone Cooperative Association

MARGOT SMILEY HUMPHREY
KOTEEN & NAFTALIN, LLP
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 467-5700
Counsel for National Rural Telecom Association

MARY MCDERMOTT
LINDA KENT
KEITH TOWNSEND
HANCE HANEY
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7300
Counsel for United States Telephone Association

LISA M. ZAINA
21 Dupont Circle, N.W.
Suite 700
Washington, D.C. 20036
(202) 659-5990
Counsel for the Organization for the Promotion and Advancement of Small Telecommunications Companies

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, the Rural Telephone Coalition ("RTC") and United States Telephone Association ("USTA") respectfully submit these disclosure statements.

RTC is comprised of the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA"), and the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"). Each of the associations in the RTC is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers. These companies are full members of the associations. Some of the associations also have international members who provide local exchange services in other jurisdictions, and associate members consisting of consultants, manufacturers, and other parties with interests in the local exchange carrier industry. Neither the RTC nor any of the associations have any parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

USTA is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers. These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

LEGISLATIVE HISTORY

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-826, 97-829, 97-830 & 97-831

AT&T CORP., *et al.*,

Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AND RELATED PETITIONS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

CONSOLIDATED BRIEF FOR THE UNITED STATES TELEPHONE ASSOCIATION AND THE RURAL TELEPHONE COALITION IN OPPOSITION

STATEMENT

Respondent United States Telephone Association ("USTA") is a non-profit trade association that represents the interests of more than 1000 facilities-based local exchange and exchange access providers, most of which are small and mid-sized local exchange carriers ("LECs"). Respondent Rural Telephone Coalition ("RTC") is an alliance composed of three national trade associations, the National Rural Telecom Association ("NRTA"), the National Telephone Cooperative Association ("NTCA") and

the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), which together represent the interests of more than 850 small and rural incumbent LECs.

In the court of appeals, USTA and RTC joined with other parties to challenge the validity of FCC rules governing the price and other central terms of interconnection agreements that must be reviewed and approved by State commissions. USTA and the RTC also separately challenged the validity of two FCC rules of special significance to small and rural carriers: (1) 47 C.F.R. § 51.405, which required State commissions to apply restrictive standards of proof when determining whether small and rural carriers should be relieved of undue burdens imposed by the Act; and (2) 47 C.F.R. § 51.303, which required State commissions to review and approve all interconnection agreements adopted by carriers prior to the effective date of the Telecommunications Act of 1996 ("the 1996 Act"). The Eighth Circuit vacated both of these regulations based upon its conclusion that the text of 47 U.S.C. § 251(f) and § 252(a)—which assigns States the responsibility for making exemption determinations and reviewing interconnection agreements—also vests States with exclusive jurisdiction to establish the rules governing these State proceedings. Pet. App. at 28a, 36a. The Commission and the other Petitioners have now sought review of these rulings as part of their broad-based challenge to the decision of the Eighth Circuit. *See* FCC Pet. at (I) (question 1); AT&T Pet. at (i) (question 1); MCI Pet. at (i) (question 2); ALTS Pet. at (i) (question 2); *see also* FCC Pet. at 9, 11. Petitioners nevertheless fail to provide this Court with any background concerning these regulations or the statutory provisions they implement. We accordingly do so here.[1]

---

[1] This brief in opposition only addresses the Eighth Circuit's decision with respect to these two rules. USTA and RTC join the arguments set forth in the briefs of the Regional Bell Companies and GTE (the "Large LECs") and the Mid-Sized Local Exchange

1. Throughout much of this century, States have adopted specially tailored policies designed to maintain the investment incentives of the small and rural carriers that provide service to remote areas.[2] Providing universal service to rural areas has presented challenging policy issues for many decades because the high cost associated with the delivery of rural service makes it difficult for telephone companies to offer customers affordable rates or to provide investors with attractive rates of return. Small carriers that have made the substantial investment in rural markets are obligated to serve their entire local exchange service areas as "carriers of last resort." As a consequence, these small businesses are particularly vulnerable to "cream skimming" by new entrants that target only high-volume business users in the rural territories. *See, e.g.*, H.R. Rep. No. 81-246, at 8 (1949) ("1949 House Report") (observing that Congress imposed area-wide coverage requirements because telephone companies were "running their lines down the highways into the most profitable areas and relegating farmers in the less profitable service areas perpetually to a nontelephone hinterland"). Left unchecked, the loss of even one or two high-volume customers in a rural market will drive up the costs of serving the rural LEC's remaining residential customers and/or diminish the economic viability of the rural service providers. The efficiency and public policy justifications for introducing vigorous competition accordingly have been far less apparent in rural markets than in densely populated urban areas where vast economies of scale and lower cost services are possible.[3]

Carriers (the "Mid-Sized LECs") with respect to other aspects of the Eighth Circuit's opinion.

[2] *See, e.g., Northwestern Bell Telephone Co.*, 71 Pub. Util. Rep. (PUR) 1, 11 (S.D. PUC 1947) (stating that "it is the general policy of this Commission to encourage the extension of exchange service to every community and household of the state").

[3] *See* John C. Panzar & Steven S. Wildman, "Competition in the Local Exchange: Appropriate Policies to Maintain Universal

2. In enacting the Telecommunications Act of 1996, Congress fundamentally changed the nature of competition in the markets for local telecommunications services by removing many competitive barriers to entry. But Congress did not renounce decades of special policies designed to enable small companies to provide service and update their networks in rural areas, or the primacy of the States' role in fostering the success of these rural ventures. Congress' plan to give State commissions authority to prevent unchecked competition in rural markets is reflected in numerous provisions of the 1996 Act.

Under Section 253(a), States may not prohibit firms from providing "any interstate or intrastate telecommunications service" *except* in rural markets. In Section 253(f), Congress authorizes States to require any firm entering a market served by a rural telephone company to provide universal service throughout the market so as to prevent the entry of competitors seeking to "cream skim" rural markets. Congress then made the entry of a second carrier in rural markets even more difficult through the terms of its rules governing financial support for carriers providing universal service. Congress gave States authority to determine which carriers should be eligible to receive universal service funding in each market, and provided that only one carrier would be eligible for universal service funding in "an area served by a rural telephone company," unless the State commission makes an express finding that it would serve the "public interest" to authorize additional universal service carriers. 47 U.S.C. § 214(e)(2).

Congressional differentiation of competition policies to be administered by the States in rural markets is further reflected in Section 251(f), which establishes two statutory

---

Service in Rural Areas," at 4-8, attached to Testimony of Lawrence C. Ware, Rural Telephone Coalition, House Energy and Commerce Subcommittee on Telecommunications and Finance, H.R. 3636 (Feb. 9, 1994) (hereinafter "Panzar").

mechanisms to relieve small and rural telephone companies of undue burdens. Section 251(f)(1) grants "rural telephone compan[ies]" [4] an exemption from the competitive obligations imposed on incumbent LECs by Section 251(c)—obligations that include mandatory requirements for incumbent carriers to provide competitors interconnection with their facilities and to make available unbundled network elements.[5] 47 U.S.C. § 251(f). States are given express authority to administer this exemption. State commissions—and not the FCC—must determine whether to terminate the Section 251(f)(1) exemption if a carrier makes a "bona fide request" for interconnection and files notice of the request with the State commission. The rural exemption only terminates if the "State commission determines" that "such request is not unduly economically burdensome," is "technically feasible," and is otherwise "consistent" with certain universal service provisions of Section 254. 47 U.S.C. § 251(f)(1)(A).

Congress also gave States authority to grant discretionary relief to any LEC (including a rural telephone company) that has "fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" (referred to herein as "small companies"). These companies may petition a "State commission" for a suspension or modification of any requirement imposed by Section

---

[4] The definition of a "rural telephone company" is established in 47 U.S.C. § 153(37).

[5] Congress recognized the need to include some type of exemption or waiver provision to create a "level playing field, particularly when a company or a carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources of the company or carrier." S. Rep. No. 104-23, at 22 (1995) ("Senate Report"); *see also* H.R. Rep. No. 104-204, pt. 1, at 74 (1995) ("House Report") (rural exemption necessary to avoid "significant costs associated with seeking a modification or waiver before the Commission"). Such concerns culminated in Section 251(f).

251(b) or Section 251(c). 47 U.S.C. § 251(f)(2). A petition filed under this section may be granted by the State commission if it finds that the suspension or modification is necessary to avoid a "significant adverse economic impact on users of telecommunications services generally," an undue economic burden, or a requirement that is "technically infeasible," to the extent consistent with "the public interest." 47 U.S.C. § 251(f)(2)(A), (B). The FCC is mentioned only once in Section 251(f): when a State commission terminates a rural carrier's exemption under Section 251(f)(1), it is directed to establish a compliance schedule consistent with Commission regulations. 47 U.S.C. § 251(f)(1)(B).

3. The 1996 Act also preserved State responsibility for regulating rural carriers' agreements with larger, non-competing LECs. For many years, rural telephone carriers have depended upon "co-carrier" relationships with larger companies to provide efficient service to rural subscribers. *See* Panzar at 34. Such joint arrangements between non-competing LECs have served to reduce modernization costs and preserve revenues for universal service. For example, Extended Area Service ("EAS") arrangements between rural LECs and their neighboring large LECs enable rural and urban subscribers to call each other without incurring long distance charges. The prices of shared service components for rural LECs under such agreements are generally lower than prices made available to requesting carriers in a competitive marketplace. *See id.* at 41.

Rural carriers entered into hundreds of agreements of this type prior to the effective date of the 1996 Act, and one of the questions at issue in this case is how these agreements are affected by the terms of the Act. As described in the opposition briefs of the Large and Mid-Sized LECs, Sections 251 and 252 of the Act seek to introduce competition through reliance on private party negotiations and State commission review and approval of interconnec-

tion agreements. Section 252(a)(1) provides that an incumbent local exchange carrier "may negotiate and enter into a binding agreement with the requesting telecommunications carrier" upon receipt of a "request for interconnection, services, or network elements pursuant to section 251." 47 U.S.C. § 252(a)(1). Section 252(e) in turn provides that "[a]ny interconnection agreement adopted by negotiation or arbitration" under Sections 251 or 252 "shall be submitted for State approval." 47 U.S.C. § 252(e)(1). The Act does not clearly say whether State commissions must require agreements "negotiate[d] and enter[ed] into" before the effective date of the Act to be submitted to them for review and approval, although it clearly does require submission of an agreement which was "negotiated" before the enactment date, but executed afterwards. 47 U.S.C. § 252(a)(1).

4. There is no dispute that Congress authorized States to adopt implementing regulations to fulfill their obligations to conduct exemption and suspension proceedings under Section 251(f) and interconnection approval proceedings under Section 252. *See* 47 U.S.C. § 261(b) (stating that "[n]othing in this part shall be construed to prohibit any State commission . . . from prescribing regulations . . . in fulfilling the requirements of this part [including Section 251(f) and Section 252(a)], if such regulations are not inconsistent with the provisions of this part"). The FCC confirmed this reading in its order by acknowledging that "we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings." *First Report and Order* at ¶ 1251 (App. 2a). The FCC nevertheless decided to prevent States from adopting their own interpretations of central terms of Section 251(f) and Section 252(a) through rulemaking or adjudications. The Commission instead adopted "national rules" and directed States to render decisions that "conform to our rules." Pet. App. at 173a.

The national rule promulgated under Section 251(f) required State commissions to adhere to a restrictive interpretation of the standards for relief established under Section 251(f). First, Rule 51.405 displaced the three prerequisites for terminating an exemption established under Section 251(f)(1)—technical feasibility, undue economic burden, and consistency with universal service provisions—with a single "embellish[ed]" standard, Pet. App. at 28a, that required termination of any exemption absent proof that the request would impose an "undue economic burden." [6] Second, the FCC determined that an "economic burden" warranting relief could not include any "economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c); Pet. App. at 307a. Third, once a bona fide request is made by a requesting carrier, the FCC's rule assigned the burden of proof to rural telephone companies, based on the Commission's view that "it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements," without analyzing the text of the relevant provisions. *First Report and Order* at ¶ 1263 (App. 2a-3a).

The national rule promulgated under Section 252(a) required State commissions to review and approve hundreds of preexisting agreements between non-competing, neighboring LECs, including EAS agreements. The FCC interpreted the language of Sections 252(a) and (e) to require approval, despite its acknowledgment that such agreements "were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 Act." *First Report and Order* at ¶ 170 (App. 1a-2a).

---

[6] The FCC asserted in the Eighth Circuit that it did not intend to displace the other prerequisites for termination of a rural exemption, but the terms of the rule expressly provided otherwise. *See* 47 C.F.R. § 51.405(c) ("In order to justify continued exemption . . . an incumbent LEC must offer evidence . . . [of] undue economic burden . . . .").

5. The Eighth Circuit vacated the FCC's pricing regulations because they "exceeded" the FCC's jurisdiction. *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir. July 18, 1997), Pet. App. at 1a, 8a. This determination was based upon an analysis of the text of the provisions governing the States' authority to regulate pricing in local exchange markets. *Id.* at 8a-27a. The Eighth Circuit also vacated non-price rules where the text of the 1996 Act established congressional intent to vest the States with exclusive jurisdiction.

The Eighth Circuit vacated the FCC's rules governing State rural exemption, suspension and modification proceedings because the "plain meaning of subsection 251(f)(1) (governing exemptions) and 251(f)(2) (governing suspensions and modifications) indicates that the state commissions have the exclusive authority to make these determinations." *Id.* at 28a. The court emphasized that "nothing in either of these provisions, or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations." *Id.* In contrast to the "repeated and exclusive" references to State commission determinations in Section 251(f), the court of appeals found absolutely "no indication that state commissions must follow FCC standards" in conducting exemption, suspension or modification inquiries. *Id.* The court found that this conclusion was further confirmed by the fact that Congress had rejected both a Senate bill and a House bill giving the FCC concurrent jurisdiction with State commissions to administer these provisions. *Id.* at 29a. The court held that it would be "unreasonable to infer from subsection 251(d) or the other general rulemaking provisions cited by the FCC that Congress intended to put the Commission—the agency it decided to exclude from the exemption process—in a position to dictate the substantive standards governing the exemption process." *Id.* at 29a-30a. After resolving the issue based on the language of Section 251(f) alone, the court of appeals found that Section 2(b) created an additional ground for its decision.[7] *Id.* at 30a ("[S]ection 2(b)

bars" the FCC's rule "as well."). The court reasoned that "determinations of whether small or rural LECs should receive exemptions, modifications, or suspensions" of interconnection duties qualify as "practices or regulations" which are made "in connection with intrastate communication service" within the meaning of Section 2(b). *Id.* The court declined to address respondents' substantive challenges to the regulation in light of its jurisdictional holding. *Id.*

The Eighth Circuit also vacated the FCC's rule requiring State commissions to review and approve all preexisting interconnection agreements. The Eighth Circuit determined that "[n]othing" in Section 252 "can be read to authorize the FCC to issue regulations regarding which interconnection agreements must be submitted for state approval." Pet. App. at 35a. The court emphasized that Section 252 "establishes the procedures and standards that *state commissions* must follow when approving and arbitrating agreements under the Act." *Id.* (emphasis in original). Acknowledging the FCC's "grasp for some sort of statutorily-based jurisdiction over these interconnection agreements," the court of appeals nevertheless concluded that "section 2(b) forecloses the ability of the Commission to determine which interconnection agreements must be submitted for state commission approval." *Id.* at 36a, 35a. The court concluded that this issue must be resolved by State commissions. *Id.* at 36a & n.26.

The Eighth Circuit also rejected the FCC's attempt to compel States to conform their decisions to its "national rules" (Pet. App. at 173a) for an additional reason. As the Eighth Circuit explained, the FCC's order "purport[ed] to preempt any state policy that conflicts with an FCC regulation promulgated pursuant to section 251." Pet.

---

[7] Section 2(b) of the Act provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. § 152(b); Pet. App. at 15a.

App. at 36a. The court reiterated its conclusion that the "FCC's authority to prescribe and enforce regulations to implement the requirements of section 251 is confined to the six areas in this section where Congress expressly called for the FCC's participation." *Id.* at 37a. The court found, in addition, however, that the statutory provisions governing the scope of FCC preemption of State rules, set forth in 47 U.S.C. § 251(d)(3) and § 261 "further constrain[] the FCC's authority." *Id.* The court emphasized that the plain language of Section 251(d)(3) established that the FCC could not preempt State commission orders establishing interconnection obligations so long as they are "consistent with the requirements of section 251" and do not "substantially prevent the implementation of the requirements of section 251 and the purposes of Part II." *Id.* The court explained that "[t]his provision does not require all state commission orders to be consistent with all of the FCC's regulations promulgated under section 251," because it is "entirely possible for a state interconnection or access regulation . . . to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251." *Id.* at 37a-38a. The FCC would accordingly have no basis to preempt such State rules merely because it had jurisdiction to speak on the subject.

REASON FOR DENYING THE WRIT

Petitioners ask this Court to conduct an expansive review of numerous issues of statutory interpretation resolved by the Eighth Circuit in accordance with settled principles. The three justifications they advance for conducting plenary review of the Eighth Circuit's decision are as unpersuasive with respect to the FCC's rules governing small carriers and preexisting LEC agreements as they are with respect to the FCC's pricing rules.[8]

---

[8] Respondents USTA and RTC join the arguments set forth in the briefs of the Large LECs and the Mid-Sized LECs.

First, the court's conclusions that the FCC had no jurisdiction to displace the States' authority to implement and apply the rural exemption of Section 251(f), or to force State commissions under Section 252(a) to require the filing of thousands of carrier-to-carrier agreements (with no discretion to evaluate which agreements warrant submission), are firmly supported by the specific language, structure and purpose of those sections. Second, contrary to the FCC's assertion, the court of appeals' reading of Section 2(b) does not "conflict in principle" with other precedents, FCC Pet. at 11, and even if it did, the court's interpretation of 2(b) was not "[c]entral to [its] analysis of the Commission's statutory jurisdiction." *Id.* at 17. The Eighth Circuit plainly stated that its jurisdictional analysis did not depend upon its reading of Section 2(b).

Third, there are no "practical" considerations that warrant review. *Id.* at 22. In less than two years, more than a thousand interconnection agreements involving nearly 300 companies have been signed and approved by State commissions across the nation, and States have been conducting exemption and suspension proceedings without need of FCC guidance. Contrary to the FCC's claims (Pet. at 23), there is no reason to conclude that Congress was attempting to ensure that the FCC's rulemaking would culminate in binding, nationwide rules on the underlying issues of statutory interpretation. Congress unquestionably did not mandate these FCC rules; expressly confirmed the jurisdiction of State commissions to address these questions; and expressly preserved State rules that do not conflict with the terms of the Act from FCC preemption. There accordingly is no "Congress[ional] direct[ive]" to secure an immediate nationwide resolution of all these issues. *Id.* Rather the Act was designed to permit the States to consider these important questions in the context of competition issues now arising in their local markets.

1.a. The FCC contends that Section 251 "prescribes a set of new federal standards to govern the development

of competitive local telephone markets," citing Section 251(f), which Congress allegedly authorized it to interpret and implement. FCC Pet. at 11. In fact, few provisions in the 1996 Act more clearly illustrate Congress' plan to grant the States exclusive authority to implement certain provisions of the 1996 Act governing competition in intrastate markets. The court of appeals correctly concluded that the "plain meaning" of Subsections 251(f)(1) and (2) "indicates that the state commissions have the exclusive authority to make [rural exemption] determinations." Pet. App. at 28a. The text of Section 251 cannot reasonably be read to authorize the FCC to adopt regulations governing the standards applicable to State commission proceedings under Section 251(f). Subsection 251(f)(1)(B) "explicitly provides, '*The State commission* shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subsection paragraph (A).'" *Id.* at 28a (emphasis added). The court emphasized that there are "[r]epeated and exclusive references to such state commission determinations . . . contained throughout subsection 251(f)," while "[i]n contrast, there is no indication that state commissions must follow FCC standards in conducting these inquiries." *Id.*

As the Eighth Circuit further found, Congress "is capable of clearly expressing its desire to grant the FCC authority . . . when in wishes to do so." *Id.* at 14a. Thus, for example, subsection 252(c)(1) requires a State commission to ensure that the resolution of "open issues" in arbitration proceedings conducted by State commissions under the terms of the Act "meet the requirements of section 251 of this title, *including the regulations prescribed by the Commission pursuant to section 251.*" 47 U.S.C. § 252(c)(1) (emphasis added).[9] Congress provided no

---

[9] Under the statute, the FCC is specifically authorized to issue regulations under subsections 251(b)(2) (number portability), 251(c)(4)(B) (limitations on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (con-

such direction to the State commissions conducting exemption, suspension, and modification proceedings. Instead, Congress indicated that States were only required to enter orders establishing "an implementation schedule" for compliance "that is consistent in time and manner with Commission regulations" once they have concluded that the termination of an exemption is warranted. 47 U.S.C. § 251(f)(1)(B); *see* Pet. App. at 29a. The fact that Congress only directed State commissions to adhere to specified Commission regulations "[u]pon termination of [an] exemption" negates any inference that Congress impliedly authorized the FCC to adopt other rules governing a State commission's resolution of requests pertaining to exemptions under Section 251(f). 47 U.S.C. § 251(f)(1)(B).[10]

The FCC's claim that Congress intended rural exemption determinations to be subject to federal regulations is further undermined by the fact that Congress expressly rejected versions of Section 251(f) which gave the FCC concurrent jurisdiction with State commissions to administer the exemption and waiver provisions for small local exchange carriers. The Senate bill provided that the Com-

---

tinued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents). Pet. App. at 12a n.10, 29a n.23.

[10] Indeed, the interpretation of the 1996 Act that the FCC has advocated would in fact render this language of Section 251(f)(1)(B) superfluous. Under the Commission's reading of the Act, all of the State commission's determinations under Section 251(f) must "comply with the Commission's regulations." *First Report and Order* at ¶ 101, Pet. App. at 201a. But if the FCC already possesses broad authority to adopt regulations implementing Section 251(f) as it alleges—regulations which the States would be obligated to apply in resolving requests for relief under that section—it would have been completely unnecessary for Congress to direct the States to adopt an implementation schedule that conformed to Commission regulations. It is apparent, therefore, that Congress simply did not authorize the Commission to adopt any other regulations implementing Section 251(f).

mission *or* a state could provide small companies with relief from the obligations of Section 251. *See* S. 652, 104th Cong. § 251(i) (1996); Senate Report at 22. The House bill gave State commissions authority to administer exemption and waiver provisions for rural telephone companies, but also gave the FCC authority to grant waivers for any local exchange carrier with fewer than 500,000 access lines installed. *See* H.R. 1555, 104th Cong. § 242(e)-(g) (1996). Both of these bills were rejected in conference, and the States were given *sole* authority to conduct exemption, suspension and modification proceedings for all small carriers. *See* 47 U.S.C. § 251(f)(1)-(2). The FCC's effort to claim dual jurisdiction to control the resolution of exemption proceedings in State commissions after Congress deliberately excluded the FCC from the process was correctly rejected by the court of appeals. *See* Pet. App. at 29a; *Russello v. United States*, 464 U.S. 16, 23 (1983) (declining to adopt an interpretation at odds with changes in the language of a bill).

The language and history of Section 251(f) make its intent plain. Congress determined that State agencies are better situated to evaluate the special concerns of rural areas, and to administer provisions designed to shield small companies operating in their jurisdictions from unduly harmful effects of the new obligations. Under these circumstances, it is unreasonable to infer that Congress nevertheless meant to put the FCC—the agency it decided to exclude from the exemption process—in a position to dictate the substantive standards that states should apply in their own agency proceedings (let alone to rewrite the statutory standard).

The fact that FCC rules may promote national uniformity on selected issues is beside the point. *See* FCC Pet. at 22-23; *First Report and Order* at ¶¶ 53-62, Pet. App. at 165a-173a. If Congress believed that national uniformity in the administration of Section 251(f) was a paramount consideration, it would have granted the FCC exclusive jurisdiction to adjudicate these proceedings. It

did not do so. Congress instead chose to vest these decisions in 50 separate sovereigns, and did not even establish a right to direct review in federal district courts of State commission exemption or suspension determinations. *See* 47 U.S.C. § 252(e)(6) (limiting direct federal court review to State decisions approving interconnection agreements). There is simply no basis to infer that Congress empowered the FCC "to promulgate standards governing state commission determinations of exemptions and modifications." Pet. App. at 29a.[11]

b. Subsections 252(a) and (e) of the Act require interconnection agreements to be approved by State commissions. In its pursuit of increased competition at any cost, the FCC determined that States must review and approve *all* interconnection agreements that predated the passage of the Act. The FCC reached this conclusion even though the State of Wisconsin, for example, had interpreted Section 252(a) to exclude agreements executed before the effective date, and explained the unwarranted burdens the FCC's interpretation would impose on State commissions. Petition for Reconsideration by Public Service Commission of Wisconsin, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (Sept. 30, 1996). Under this interpretation, hundreds of contracts negotiated under "very different" competitive circumstances. *First Report and Order* at ¶ 170 (App. 1a-2a), must be reviewed by State commissions. The Eighth Circuit correctly vacated the rule based upon its finding that State commissions—not the FCC—were given authority to interpret the scope of their own obligations under these sections.

As set forth in the court of appeals' opinion, the FCC's jurisdiction to adopt regulations implementing the 1996

---

[11] The preemption provisions of the Act discussed *infra* at 22-24, further undercut the FCC's assertion that "nationally uniform interpretations" of interconnection or access obligations under the Act were either envisioned or intended by Congress. FCC Pet. at 23.

Act is limited in scope. Section 252 of the 1996 Act establishes the process and standards that *States* must follow when arbitrating and approving interconnection agreements. The FCC's role under this section is extremely circumscribed—indeed, it is limited only to stepping in to oversee the arbitration process in the event that a State commission refuses to act. *See* 47 U.S.C. § 252 (e)(5). The text and structure of Section 252 cannot reasonably be read to confer upon the FCC the authority to implement regulations specifying the obligations of interconnectors to submit their agreements for approval under Subsections 252(a) and (e). As the court found, these agreements "almost exclusively involve local intrastate telecommunication services," Pet. App. at 35a, where Congress has traditionally relied upon State commissions to regulate competition. The fact that Congress has established limited standards to guide the exercise of the States' discretion does not mean that the FCC is the final arbiter of how the States should implement those standards. The Eighth Circuit correctly determined that Congress assigned that role to the States.

2. The FCC and other Petitioners have attempted to construct an alleged "conflict[] in principle" among the circuits with respect to the court of appeals' conclusion that Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), also constrained the FCC's ability to dictate every detail of local competition determinations. FCC Pet. at 20; *see* AT&T Pet. at 12-21. The agency argues first, that the court of appeals erred in applying 2(b) because Congress " 'straightforwardly' and comprehensively subjected competition in local telephone markets to" federal regulation, FCC Pet. at 17-18 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986)), and second, that even if the Commission's authority to "implement the core provisions of Sections 251" were ambiguous, Section 2(b) would still pose no bar because "the regulatory subjects of Sections 251 and 252

are inextricably both interstate and intrastate in character." FCC Pet. at 19.

The flaws in the Commission's challenge to the Eighth Circuit's analysis of Section 2(b) are discussed in the opposition briefs of the Large LECs. Those arguments apply fully to the small company issues addressed here. As the court of appeals found, "determinations of whether small or rural LECs should receive exemptions, modifications, or suspensions of such duties also qualify as practices or regulations 'for or in connection with intrastate telecommunications service' that are outside of the FCC's jurisdiction by the operation of section 2(b)." Pet. App. at 30a (quoting 47 U.S.C. § 152(b)). Similarly, the court of appeals correctly determined that Section 2(b) "forecloses the ability of the Commission to determine which interconnection agreements" governing intrastate service "must be submitted for state commission approval." *Id.* at 35a. As the briefs of the Large LECs demonstrate, these conclusions do not conflict with the decisions of any other circuit.

Any error in the Eighth Circuit's Section 2(b) analysis would not, in any event, warrant review. The FCC's effort to characterize the court's interpretation of Section 2(b) as "[c]entral" to its "analysis of the Commission's statutory jurisdiction," FCC Pet. at 17, for purposes of creating an issue worthy of certiorari, does not withstand scrutiny. The Eighth Circuit clearly premised its decision on an independent analysis of the text of each statutory provision, and Section 2(b) was only cited as an additional reason for its determination—not the "central" reason. When interpreting the Section 251(f) rural exemption, for example, the court of appeals thoroughly analyzed the language and structure of that section in concluding that the "plain meaning" of Subsection 251(f)(1) and (f)(2) "indicates that the state commissions have the exclusive authority to make" rural exemption determinations, and that "nothing" in the text of Section 251(f),

"or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations." Pet. App. at 28a. Only then did the court find that Section 2(b) stands as an independent bar to the exercise of FCC jurisdiction "as well." *Id.* at 30a.

3. Finally, the FCC believes that certiorari is justified because the Eighth Circuit's decision, on a "practical level," is somehow "imped[ing] the competition that Congress sought to bring to local telephone markets" by preventing a swift nationwide resolution of all central issues of statutory interpretation. FCC Pet. at 22. This argument failed when the FCC unsuccessfully requested this Court to vacate the Eighth Circuit's stay of the FCC's pricing rules. *See* FCC Application to Vacate Stay at 27, *FCC v. Iowa Utilities Board*, No. A-299 (Oct. 24, 1996). It should also fail now.

a. Contrary to the FCC's assertions, the Section 251-252 framework of private party negotiations and State commission arbitration crafted by Congress has been working well since the Act's passage to foster the emergence of local exchange competition. To date, *hundreds* of local interconnection agreements have been signed since the Act's passage, with new competitors emerging each day in local telephone markets. National Association of Regulatory Utility Commissioners, *Telecommunications Competition Report* at iii-iv (Sept. 1997). That process would be even more effective if the FCC had not decided, in the most intrusive manner possible, to inject itself into the private party negotiations and State commission arbitration process. Congress intended private parties first, and then the States, to be the impetus for the development of local competition. Congress did *not* invite the FCC to introduce more than 700 pages of binding federal guidance into Congress' "pro-competitive, de-regulatory" program.

b. The FCC has offered no evidence that the Eighth Circuit's decision has disrupted the State process for de-

ciding issues concerning the rural exemption or the submission of interconnection agreements. As a practical and policy matter, Congress' deference to the States with respect to local interconnection matters generally, and with respect to rural exemption and interconnection agreement filing issues in particular, makes perfect sense. The State commissions are the agencies with the particular knowledge and expertise regarding the status of local competition in their States, and the specific carriers that are either incumbent, emerging and or at risk when local competition is introduced.

Two examples illustrate the fact that Congress' scheme is working better without the FCC's mandatory directives to State commissions on these small company issues. The Alabama Public Service Commission recently considered the "financial and technical limitations of [Alabama's] small LECs"; found that the interconnection obligations imposed by Subsections 251(b) and (c) would impose undue economic burdens; and temporarily suspended those obligations pending further review of "the effects of competitive entry" on Alabama's rural carriers. *In re All Telephone Cos. Operating in Alabama,* Docket No. 24472 (LEXIS, Pub. Util. Rep. 4th, slip op.) (Oct. 8, 1996). Significantly, that determination was based upon a reasonable interpretation of the Act *without* reference to the FCC's "embellish[ed]" and restrictive standard of proof for rural exemption, suspension and modification proceedings, Pet. App. at 28a, which otherwise could have significantly impeded Alabama's ability to shape competition policy in accordance with the needs of Alabama's small carriers and their customers.[12] Similarly, some State

---

[12] Congress established that State commissions could not terminate an exemption or deny a suspension or modification, when the imposition of certain obligations under Section 251 would be "unduly economically burdensome." *See* 47 U.S.C. § 251(f)(1)(A) and (2)(A)(ii). This was the standard that Alabama applied. Section 51.405(c) and (d) of the FCC's new rules, however, would have required proof of an "undue economic burden" other than an

commissions have been assessing what types of agreements should be filed under Section 252(a) pursuant to their own reasonable interpretations of the Act. Minnesota, for example, has commenced a proceeding to determine whether EAS agreements, which are of enormous importance to small and rural carriers, in fact represent the type of agreements that should be subject to Section 252(a) filing and approval requirements. *See In re US WEST Communications, Inc.*, Docket No. P-421, 1997 WL 634623 (Minn. P.U.C. June 24, 1997). Under the FCC's mandatory rules, that inquiry would have been foreclosed because the FCC determined that all pre-existing agreements, including EAS agreements, had to be filed

---

"economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c), (d) (emphasis added). Under this new "efficient competitive entry" standard—which appears *nowhere* in the statutory text—State commissions such as Alabama would have been required to disregard losses that would threaten the viability of a rural telephone company if such losses would be attributable to the entry of a more efficient competitor seeking to serve part of a rural market. *Compare* 47 U.S.C. § 613(d)(3), (e) (defining an "undue burden" in another section of the Communications Act to include *any* "significant difficulty or expense"); *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 494 F.2d 1118, 1124 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) (interpreting similar phrase in statute creating small carrier exemption from economic regulatory provisions of the Federal Aviation Act to reflect intent to keep small carriers "economically viable"). That reasoning completely ignores the fact that Congress understood the need to give States substantial latitude to mitigate the impact of the Act on rural telephone companies and their customers. *See, e.g.*, 47 U.S.C. §§ 253(f), 214(e). The Commission's interpretation of Section 251(f) arbitrarily advanced one congressional policy—promoting competition—at the expense of another congressional policy—preserving the economic viability of rural telephone companies, and the interests of communities they serve, during this period of great change. *See Estate of Thompson v. Commissioner*, 864 F.2d 1128, 1134-36 (4th Cir. 1989) (rejecting agency interpretation that did not give full effect to congressional purpose of protecting family farms and small businesses). For this reason as well, the FCC's rule was properly vacated by the court of appeals.

with State commissions. *See* Pet. App. at 287a-88a (text of 47 C.F.R. § 51.303).

The actions taking place in the States illustrate the problem with the FCC's emphasis on the alleged practical and policy need for "nationally uniform interpretations" regarding local competition issues. FCC Pet. at 23. Congress' point in crafting the Section 251-252 regime in fact was (and is) just the opposite: except for certain discrete matters where federal involvement is required by the Act, local competition determinations generally are not and should not be "nationally uniform." Instead, they must be tailored to the specific carriers, and the specific economic and competitive circumstances, that exist in particular markets.

c. The FCC's case for certiorari places substantial reliance on the claim that the Eighth Circuit's interpretation of the FCC's jurisdiction frustrates congressional intent by preventing "a single court of appeals" from "resolv[ing]" the "most fundamental issues arising under the Act" within "a year or two" of its effective date. FCC Pet. at 23. Yet, there is no reason to believe that Congress shared the Commission's view that this rulemaking proceeding should culminate in uniform national rules even if Congress granted the FCC concurrent jurisdiction to address these issues.

First, there is no dispute that Congress expected States to adopt interpretive rules when conducting rural exemption and interconnection proceedings, and that Congress did not *require* the FCC to adopt rules on the statutory questions at issue here. Congress was accordingly content to allow these issues to be resolved through State proceedings conducted over time.

Second, as the Eighth Circuit held, Congress did not allow the FCC to establish nationally uniform standards which categorically preempt contrary State rules *even if* it had concurrent jurisdiction. The Eighth Circuit rejected

the FCC's view that its rules "preempt any [different] state policy" as "untenable." Pet. App. at 36a. The Commission's assertion that State decisions implementing Sections 251 and 252 must conform to FCC regulations, even where Congress did not say so, is refuted by Section 261 and Section 251(d)(3).

Section 261 authorizes States to adopt implementing regulations to fulfill its obligations under the 1996 Act, and provides that such regulations do not have to conform to Commission regulations. Section 261(b) is explicit: "[*n*]*othing in this part* shall be construed to prohibit any State commission . . . from prescribing regulations . . . in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." 47 U.S.C. § 261(b) (emphasis added). Congress only required States to conform their actions to "the Commission's regulations" if they seek to adopt "additional" regulations beyond those enacted to "fulfill [] the requirements of this part." *See id.*; 47 U.S.C. § 261(c). Section 251(d)(3) further confirms the fact that State commissions are not obligated to implement Section 251 in accordance with national regulations adopted by the FCC. Under that section, Congress prohibited the agency from "prescribing . . . regulations" that would "preclude the enforcement" of any state "regulation, order or policy" that is consistent with the policies and requirements of Section 251. 47 U.S.C. § 251(d)(3). If Congress' goal was nationwide uniformity, it presumably would have drafted a far broader preemption provision.

Third, Congress clearly did not create a scheme where federal district courts would "supply nationally uniform interpretations" of all of the provisions construed by the FCC in its rules. FCC Pet. at 23. Congress did not even grant federal district courts jurisdiction to conduct direct review of State commission determinations issued under Section 251(f). *See* 47 U.S.C. § 252(e)(6).

The FCC's vision of a congressional plan for nationwide resolution of all these statutory issues in a single proceeding simply cannot be reconciled with the terms of the Act. Instead, Congress adopted a program that permits States to develop reasonable interpretations of the Act in the course of conducting the proceedings Congress assigned to them. Short-circuiting that process in the name of litigation expediency undermines the State's role in the statutory scheme without any justification in the text of the statute.

CONCLUSION

For the reasons set forth, petitioners respectfully request this Court to deny the petitions for certiorari.

Respectfully submitted,

GARY M. EPSTEIN
MAUREEN E. MAHONEY *
RICHARD P. BRESS
JAMES H. BARKER
LATHAM & WATKINS
1001 Pennsylvania Ave., N.W.
Suite 1300
Washington, D.C. 20004-2505
(202) 637-2200

Counsel for Respondents United States Telephone Association and Rural Telephone Coalition

* Counsel of Record

(Other counsel listed on next page)

December 18, 1997

DAVID COSSON
L. MARIE GUILLORY
2626 Pennsylvania Ave., N.W.
Washington, D.C. 20037
(202) 298-2300
Counsel for National Telephone Cooperative Association

MARGOT SMILEY HUMPHREY
KOTEEN & NAFTALIN, LLP
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 467-5700
Counsel for National Rural Telecom Association

MARY MCDERMOTT
LINDA KENT
KEITH TOWNSEND
HANCE HANEY
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7300
Counsel for United States Telephone Association

LISA M. ZAINA
21 Dupont Circle, N.W.
Suite 700
Washington, D.C. 20036
(202) 659-5990
Counsel for the Organization for the Promotion and Advancement of Small Telecommunications Companies

APPENDIX

FROM *IN THE MATTER OF IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996*, FIRST REPORT AND ORDER, CC DOCKET NO. 96-98, FCC 96-325, ¶¶ 170, 1251, 1263 (AUGUST 8, 1996).

* * * *

170. Some parties have suggested that we provide parties an opportunity to renegotiate preexisting contracts. Parties, of course, may mutually agree to renegotiate agreements, but we decline to mandate that parties renegotiate existing contracts. In addition, as discussed below, commercial mobile radio service (CMRS) providers that are party to preexisting agreements with incumbent LECs that provide for non-mutual compensation have the option of renegotiating such agreements with no termination liabilities or contract penalties.[334] We believe that generally requiring renegotiation of preexisting contracts is unnecessary, however, because state commissions will review preexisting agreements, and may reject any negotiated agreement that "discriminates against a telecommunications carrier not a party to the agreement," or that "is not consistent with the public interest, convenience, and necessity."[335] We recognize that preexisting agreements were negotiated under very different circumstances, and may not provide a reasonable basis for interconnection agreements under the 1996 act. For example, non-competing neighboring LECs may have negotiated terms that simply are not viable in a competitive market. It would not foster efficient long-term competition to force parties to make available to all requesting carriers interconnection on terms not sustainable in a competitive environ-

---

[334] *See infra*, Section XI.A.

[335] 47 U.S.C. § 252(e)(2)(A).

ment. In such circumstances, a state commission would have authority to reject a preexisting agreement as inconsistent with the public interest. If a state commission approves a preexisting agreement, that agreement will be available to other parties in accordance with section 252(i). Contrary to NYNEX's assertion, once a state approves an agreement under section 252(e), that agreement is "approved under" section 252.

* * * *

1251. We discuss below issues raised by the commenters, and establish some rules regarding the requirements of section 251(f) that we believe will assist state commissions as they carry out their duties under section 251(f). For the most part, however, we expect that states will interpret the requirements of section 251(f) through rulemaking and adjudicative proceedings. We may in the future initiate a Notice of Proposed Rulemaking on certain additional issues raised by section 251(f) if it appears that further action by the Commission is warranted.

* * * *

1263. Given the pro-competitive focus of the 1996 Act, we find that rural LECs must prove to the state commission that they should continue to be exempt pursuant to section 251(f)(1) from requirements of section 251(c), once a bona-fide request has been made, and that smaller companies must prove to the state commissions, pursuant to section 251(f)(2), that a suspension or modification of requirements of sections 251(b) or (c) should be granted. We conclude that it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements. Moreover, the party seeking exemption, suspension, or modification is in control of the relevant information necessary for the state to make a determination regarding the request. A rural company that falls within section 251(f)(1) is not required to make any showing until it receives a bona fide request for interconnection, services, or network elements.

We decline at this time to establish guidelines regarding what constitutes a bona fide request. We also decline in this Report and Order to adopt national rules or guidelines regarding other aspects of section 251(f). For example, we will not rule in this proceeding on the universal service duties of requesting carriers that seek to compete with rural LECs. We may offer guidance on these matters at a later date, if we believe it is necessary and appropriate.